

# 'Medical meets Beauty' – recent decision on dental sector advertising

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## Introduction

### Facts

### First and second-instance decisions

### Supreme Court decision

### Comment

## Introduction

The Dental Chamber has issued a restrictive Directive on Advertising<sup>(1)</sup> based on the Dental Act.<sup>(2)</sup>

Under the directive, print media ads must not exceed quarter of a page and dentists must not use unobjective advertising (eg. ads which promise patients non-dental advantages or services). Further, the provisions relating to the dental profession cover not only the treatment and cure of dental diseases, but also the performance of cosmetic and aesthetic intervention on teeth insofar as such intervention requires a dental examination and diagnosis.

## Facts

The Dental Chamber requested a dentist and a company with limited liability in which he was a majority shareholder to cease and desist. The dentist and the company had run a full-page print media ad which included the English phrase 'Medical meets Beauty' and advertised dental care and various cosmetic treatments such as cosmetic teeth bleaching.

## First and second-instance decisions

At first instance, the court granted the requested interim injunction on the basis that an ad in print media must not exceed quarter of a page;<sup>(3)</sup> however, the defendants' ad covered a whole page. Despite the spatially separate (by colour) advertised services of the first defendant (dentist) and the second defendant (his company), the prescribed ad size had been exceeded because the defendants each advertised on half a page.

The court additionally held that:

- the services offered in the ad (namely, facial and body treatments) infringe Articles 1 and 2 of the Directive on Advertising; and
- cosmetic bleaching (although without peroxide) implies a photochemical reaction in the dentine which would require a dental examination and diagnosis reserved for dentists; however, the second defendant was neither a dentist nor a dental clinic.

The appellate court confirmed the first-instance decision.<sup>(4)</sup>

## Supreme Court decision

The Supreme Court upheld the lower-instance decisions,<sup>(5)</sup> confirming that the advertising restrictions imposed by the Directive on Advertising comply with EU law. The decision in *Luc Vanderborght*<sup>(6)</sup> referred to by the appellants concerned the general prohibition of advertising for physicians, whereas the directive provides only for a limited prohibition. Moreover, in *Luc Vanderborght*, the European Court of Justice (ECJ) had considered general prohibitions to comply with EU law; however, the ECJ had concerns only in respect of the e-Commerce Directive (2000/21/EC) and the free movement of services according to Article 56 of the Treaty on the Functioning of the European Union.

The ad's full headline had been "Medical meets Beauty by [first defendant] and [second defendant]" and contained the slogans "Well-being instead of fear" and "Combination of exclusivity, atmosphere

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and professionalism" to advertise a series of dental and cosmetic treatments. Therefore, the appellant's argument that the ad had not advertised dental services in combination with cosmetic services, but only provided information on cosmetic services was implausible. On this basis, the appellate court's assessment that the ad's relevant overall impression was an unobjective amalgamation upheld Supreme Court precedent.<sup>(7)</sup>

According to longstanding Supreme Court jurisdiction, teeth bleaching falls within the scope of the dental profession even if the applied tooth gel does not contain hydrogen peroxide. This position does not conflict with the EU Cosmetic Products Regulation (1223/2009).

Further, the fact that a medical examination is made prior to treatment is an insufficient defence. According to the clear wording of Section 24(2) of the Dental Act, the service must be provided under a dentist's permanent supervision. Moreover, the offer and performance of dental services by non-dentists violates Section 4 of the act.

The second defendant was a company with limited liability performing cosmetic services and was not entitled to offer and perform dental services. The performance of dental services by a company is permitted only under certain conditions (eg, a group practice). Single-person companies or companies including non-dentists as shareholders are not permitted. Moreover, the activity of a dentist company with limited liability must be limited to the activities reserved for dentists and eventual activities in direct connection with dental services. Therefore, even if the second defendant were to perform services exclusively via the first defendant, the fact that it had two minority shareholders who were not dentists constituted a violation of the Dental Act.

### **Comment**

The Austrian professional rules for dentists are strict and restrictive and permit advertising only within tight limits. The Chamber of Dentists is highly active in enforcing both the Directive on Advertising and the Dental Act.

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### **Endnotes**

- (1) Please see [here](#).
- (2) Zahnärztegesetz - ZÄG (BGBl I 126/2005 as amended).
- (3) Graz Regional Court (civil branch), 20 July 2018, 39 Cg 62/18v.
- (4) Graz Appellate Court, 4 September 2018, 5 R 130/18d.
- (5) Supreme Court, 26 March 2019, 4 Ob 211/18k.
- (6) ECJ, 4 May 2017, C-339/15.
- (7) Supreme Court, 12 May 2018, 4 Ob 66/17k.

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